APPENDIX

APPENDIX

Opinion of the United States Court of Appeals

No. 72-2168

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

PHYLLIS B. HETRICK,

Plaintiff-Appellant,

—v.—

ROBERT R. MARTIN, President of Eastern Kentucky University, and THE BOARD OF REGENTS OF EASTERN KENTUCKY UNIVERSITY,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

Decided and Filed June 15, 1973.

Before: PECK, McCREE and KENT,* Circuit Judges.

McCREE, Circuit Judge. This appeal requires us to decide whether the First Amendment prevents a state university from discharging a teacher whose pedagogical style and philosophy do not conform to the pattern prescribed by the school administration. The district court, sitting without a

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* Judge Kent participated in the decision in this case and concurred in this opinion prior to his death on May 28, 1973.

jury, held that the Constitution did not bar officials of Eastern Kentucky University from refusing to renew plaintiff's teaching contract on the ground of impermissible deviation from the teaching standards thought appropriate by her superiors. We affirm.

Plaintiff Phyllis Hetrick was employed as a nontenured assistant English professor at Eastern Kentucky for the 1969-70 school year, and during her first semester was assigned to teach two sections of freshman composition, one sophomore literature course, and an upper level modern drama course. Her troubles with the school administration apparently began when unnamed students as well as the parents of one student complained about certain of her in-class activities. Specifically, at one point, in an attempt to illustrate the "irony" and "connotative qualities" of the English language, she told her freshman students "I am an unwed mother." At the time, she was a divorced mother of two, but she did not reveal that fact to her class. Also, she apparently on occasion discussed the war in Vietnam and the military draft with one of her freshman classes. The district court found that even though the school administration was concerned about the appropriateness of these occurrences, "it does not appear that any of the faculty members felt that Dr. Hetrick had on those particular occasions exceeded the bounds of her teaching prerogative." The student complaints during October and November 1969 allegedly centered on their inability to comprehend what she was attempting to teach them or what was expected of them, although no students were produced at trial to testify that he or she had complained about or was dissatisfied with plaintiff's teaching methods.

Other conflicts between Dr. Hetrick and her superiors developed. She did not obtain her PhD until late in her sec-

ond semester, although she agreed that she would do so by the close of the first semester. She covered only 11 plays in her modern drama course, from a textbook that had been ordered by her predecessor, and the head of the English Department, Dr. Thurman, testified that plaintiff had been told that she was expected to cover between 20 and 25 plays and that he thought the work load she assigned was too light.

In February 1970, Dr. Thurman convened a "secret evaluating committee" of four other faculty members of the English Department to meet with him. The committee, according to Dr. Thurman, was to evaluate all the nontenured teachers. Dr. Thurman recommended to the committee that plaintiff not be rehired for the following year because: her freshman class assignments were inconclusive; she was inclined to discuss extraneous matter in class; she lacked "a sense of camaraderie" and did not seem to adjust to the other members of the English Department; and she had not fulfilled her PhD requirements as promised. The committee voted to terminate Dr. Hetrick.

The district court found that these reasons asserted by Dr. Thurman were "supported by fact." However,

> the court finds from the tenor of the evidence that the nonrenewal of Dr. Hetrick's contract was not based so much on those specific reasons, as it was on the feeling of Dr. Thurmond [sic] and the other faculty members of the English Department that Dr. Hetrick's teaching philosophy and the manner in which she implemented it were not adaptable to the achievement of the academic goals of the University.

The evidence to which the court referred consisted in part of plaintiff's testimony and that of her students, and

the testimony of the defendants concerning what was expected of teachers at Eastern Kentucky. The school administration considered the students as generally unsophisticated and as having "somewhat restrictive backgrounds," and for this reason apparently expected the teachers to teach on a basic level, to stress fundamentals and to follow conventional teaching patterns—in a word, to "go by the book." Plaintiff's evidence, on the other hand, tended to show that her teaching emphasized student responsibility and freedom to organize class time and out-of-class assignments in terms of student interest, all in an effort, she claims, to teach them how to think rather than merely to accept and to parrot what they had heard.

After her termination by the University, plaintiff brought this action under 42 U.S.C. § 1983 for declaratory and injunctive relief against the president and regents of Eastern Kentucky University. She asserted that her First and Fourteenth Amendment rights had been violated by her termination without a hearing or written statement of reasons, on an arbitrary basis, for making in-class statements about the war and the draft, and because of her beliefs and ideas. The intervening decisions of the Supreme Court in *Board of Regents of State College* v. *Roth*, 408 U.S. 564 (1972), and *Perry* v. *Sindermann*, 408 U.S. 593 (1972), narrowed the issue in this case to whether plaintiff had been terminated for conduct on her part protected by the First Amendment. See *Perry* v. *Sindermann, supra*, 408 U.S. 596-98.

The district court concluded that the decision not to renew plaintiff's contract was the result of defendants' "concern for her teaching methods and ability," and was not prompted by her exercise of First Amendment rights. In discussing the scope of the protection afforded teachers by the First Amendment, the court stated:

> The First Amendment guarantee of academic freedom provides a teacher with the right to encourage a vigorous exchange of ideas within the confines of the subject matter being taught, but it does not require a University or school to tolerate any manner of teaching method the teacher may choose to employ. A University has a right to require some conformity with whatever teaching methods are acceptable to it. In this case it simply appears that Dr. Hetrick's teaching techniques were not acceptable to the University. The court is not in a position to weigh the merits of Dr. Hetrick's educational philosophy—it may be that her methods of teaching were and are more desirable than those embraced by the other members of the English Department—but the fact that the University decided that they were not and chose not to renew her contract, does not mean that her constitutional rights to academic freedom and freedom of speech were impinged.

In a memorandum opinion filed with the court's findings of fact and conclusions of law, the court elaborated on its findings in this regard:

> It is Dr. Hetrick's position that the non-renewal of her contract resulted from certain statements she made in her classes relating to the Vietnam War and the military draft. Were this contention adequately corroborated it may be that relief would be proper, however, the evidence produced at the hearing leads only to the conclusion that the University's determination not to rehire was based solely upon concern for her pedagogical attitudes. Although the court is inclined to believe that the classroom inadequacies that Dr. Het-

rick was alleged to have displayed—inconclusive assignments, extraneous classroom discussions, and insufficient coverage of suggested materials—were largely superficial and thus easily correctable, it is not the duty of the court to evaluate the wisdom of the University's decision not to renew the contract. It simply seems that Dr. Hetrick's teaching methods were too progressive, or perhaps less orthodox than the other faculty members in her department felt were conducive to the achievement of the academic goals they espoused. The court must conclude that a State University has the authority to refuse to renew a non-tenured professor's contract for the reason that the teaching methods of that professor do not conform with those of the tenured faculty or with those approved of by the University.

On appeal, plaintiff has raised two issues: does it violate the First Amendment for a public university to terminate a teacher because her teaching methods and educational philosophy do not conform with those approved by the university; did the district court err in concluding that the decision to terminate was not based on or influenced by constitutionally protected statements she made in the classroom, *i.e.*, the "unwed mother" remark and statements about the Vietnam war and the draft?

With respect to the latter issue, assuming *arguendo* that the uttering of these in-class statements would be protected by the First Amendment,[1] we conclude upon examination of the record that the findings of the district court are fully

[1] *Compare, e.g., Mailloux* v. *Kiley*, 323 F. Supp. 1387 (D. Mass.), *aff'd*, 448 F.2d 1242 (1st Cir. 1971), *with Clark* v. *Holmes*, 474 F.2d 928 (7th Cir. 1972), *cert. denied*, 41 U.S.L.W. 3595 (U.S. May 7, 1973).

supported by the evidence and that plaintiff was not discharged because of any statements she may have made.

Thus, we are squarely presented with the question whether the administration of a public school may, consistent with the First Amendment, fail to renew a nontenured teacher because of displeasure with her "pedagogical attitudes." We conclude, as did the district court, that it may.

This is not a case of dismissal of a teacher for exercising her right as a citizen to comment on matters of public concern, *see Pickering* v. *Board of Education,* 391 U.S. 563 (1968); *cf. Tinker* v. *Des Moines Independent Community School District,* 393 U.S. 503 (1969), or a case of a state's attempting to regulate the fitness and competence of its teacher by investigating the teachers' out-of-class associations, *see Keyishian* v. *Board of Regents,* 385 U.S. 589 (1967); *Shelton* v. *Tucker,* 364 U.S. 479 (1960); *Sweezy* v. *New Hampshire,* 354 U.S. 234 (1957), or even a case of a state's effort to restrict in-class utterances or assignments in order to maintain curriculum control, *compare Keefe* v. *Geanakos,* 418 F.2d 358 (1st Cir. 1969); *Mailloux* v. *Kiley,* 323 F. Supp. 1387 (D. Mass.), *aff'd,* 448 F.2d 1242 (1st Cir. 1971); *Parducci* v. *Rutland,* 316 F. Supp. 352 (M.D. Ala. 1970), *with Clark* v. *Holmes,* 474 F.2d 928 (7th Cir. 1972), *cert. denied,* 41 U.S.L.W. 3595 (U.S. May 7, 1973); *Parker* v. *Board of Education,* 237 F. Supp. 222 (D. Md.), *aff'd,* 348 F.2d 464 (4th Cir. 1965), *cert. denied,* 382 U.S. 1030 (1966); *cf. Epperson* v. *Arkansas,* 393 U.S. 97 (1968); *Meyer* v. *Nebraska,* 262 U.S. 390 (1923); *see generally Developments in the Law—Academic Freedom,* 81 Harv. L. Rev. 1045, 1051-54 (1968).

Instead, this is a case of the nonrenewal of a nontenured teacher, who was not even entitled to notice and hearing

upon receipt of the university's decision not to renew her contract. *Board of Regents of State College* v. *Roth, supra.* Although her renewal could not have been denied on a basis that invaded a constitutionally protected interest such as her interest in freedom of speech, *Perry* v. *Sindermann, supra,* 408 U.S. at 597, under the holding in *Board of Regents of State College* v. *Roth, supra,* she presumably could have been terminated for entirely arbitrary reasons that did not invade First Amendment rights. She seeks to escape the effect of this principle by claiming that what is at issue here is her constitutional right to "teach her students to think" and that the First Amendment protects her from termination for using teaching methods and adhering to a teaching philosophy that are "well-recognized within the profession" (although it does not appear that plaintiff introduced expert testimony on this question, *compare Mailloux* v. *Kiley, supra,* 323 F. Supp. 1387). Plaintiff would thus have us convert the vague, inclusive term "teaching methods" into a specific, protected form of speech that cannot be considered by a school administration in determining whether a nontenured teacher should be renewed. In effect, plaintiff would have us substitute the First Amendment for tenure, and would thereby succeed in elevating contract law to constitutional status.

We do not accept plaintiff's assertion that the school administration abridged her First Amendment rights when it refused to rehire her because it considered her teaching philosophy to be incompatible with the pedagogical aims of the University. Whatever may be the ultimate scope of the amorphous "academic freedom" guaranteed to our Nation's teachers and students, *Healy* v. *James,* 408 U.S. 169, 180-81 (1972), *see generally Developments in the Law—Academic*

Freedom, supra, it does not encompass the right of a non-tenured teacher to have her teaching style insulated from review by her superiors when they determine whether she has merited tenured status just because her methods and philosophy are considered acceptable somewhere within the teaching profession. A contrary holding would effectively emasculate the holding in *Board of Regents of State College* v. *Roth, supra,* by rendering every nonrenewal decision a likely candidate for a court suit, and we decline to accomplish the *sub silentio* overruling of that recent Supreme Court decision as well as our own in *Orr* v. *Trinter,* 444 F.2d 128 (6th Cir. 1971), *cert. denied,* 408 U.S. 943 (1972).

For the foregoing reasons, and the reasons advanced by the district court, the judgment of the district court is affirmed.

Order of Dismissal

[Filed October 6, 1972]

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
LEXINGTON

No. 2175

PHYLLIS B. HETRICK,

Plaintiff,

v.

ROBERT B. MARTIN, President of Eastern Kentucky University, and THE BOARD OF REGENTS, Eastern Kentucky University,

Defendants.

It is ordered and adjudged that the plaintiff take nothing and that the action be dismissed on the merits.
See Memorandum.

MAC SWINFORD
Judge

OCT 6 1972

Findings of Fact and Conclusions of Law

[Filed October 6, 1972]

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
LEXINGTON

No. 2175

PHYLLIS B. HETRICK,

Plaintiff,

v.

ROBERT B. MARTIN, President of Eastern Kentucky University, and THE BOARD OF REGENTS, Eastern Kentucky University,

Defendants.

The record of this case is submitted to the court for final judgment. In accordance with Rule 52(a) of the Federal Rules of Civil Procedure the court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1) The plaintiff, Phyllis Hetrick, was employed as a non-tenured assistant professor of English at Eastern Kentucky University during the 1969-1970 academic school year. The appointment was to fill a permanent vacancy in the Department of English, and it was anticipated that the contract

would be renewed for a second year or until tenure could be acquired. Notwithstanding Dr. Hetrick's expectation of renewal, the University was under no contractual obligation to rehire her for a second year.

2) Dr. Hetrick was, for the fall semester of 1969, assigned to teach two sections of Freshman Composition, one section of A Survey of Masterpieces of World Literature, and one upper division course in Modern Drama.

3) Dr. Hetrick, who is a divorced mother, made the remark during an introductory session of one of her English Composition classes that, "I am an unwed mother". Presumably the statement was made to exhibit the irony and connotative quality of the English language. Dr. Hetrick also had occasion early in the semester to discuss with one of her sections of English Composition the Vietnam War and the military draft.

4) Several of Dr. Hetrick's students were concerned with her "unwed mother" statement and her class discussion of the Vietnam War. It also appears that there was some consternation among certain of the University administrators regarding those occurrences. Correspondence between faculty members of the English Department and University administrators indicates that it was the position of the English Department that the discussion of the Vietnam War was not entirely appropriate in an English Composition class and that the "unwed mother" statement, although perhaps a suitable example to show the flavor of language, should not have been left unexplained, as was done by Dr. Hetrick. Despite the concern over these incidents, it does not appear that any of the faculty members felt that Dr. Hetrick had on those particular occasions exceeded the bounds of her teaching prerogative.

5) During the months of October and November numerous complaints were addressed to the University Ombudsman concerning the nature of Dr. Hetrick's composition classes. Similar complaints were also addressed to members of the English Department faculty. It appears that several of Dr. Hetrick's students were unable to discern what she was attempting to achieve; did not understand what was required of them; and felt that they were not being instructed in English Composition as they thought they should be.

6) When Phyllis Hetrick was hired it was agreed that she would complete her Ph.D. requirements within her first semester at Eastern. Although she did not obtain her degree, it was not granted until the close of her second semester of teaching at Eastern. This delay was of some concern to Dr. Thurmond, the Chairman of the English Department. He was apparently left with the impression that Dr. Hetrick had a propensity to temporize about things which he considered to be of importance.

7) It was understood by the University that Dr. Hetrick would specialize in teaching Modern Drama, and during her first semester at Eastern she was assigned an upper level course in Modern Drama. Although it appears that Dr. Thurmond had hoped that she would cover 20 plays in that course, her class only studied 11. Dr. Thurmond testified that he felt Dr. Hetrick's performance in her drama class was "miserable"; that the class was not nearly rigorous enough; and that, under Dr. Hetrick's instruction, it did not compare in work load or degree of difficulty with its companion courses in contemporary novel and poetry.

8) In late February of 1970, Dr. Thurmond called a "secret evaluating committee" to evaluate all of the teach-

ers on one year contracts. This committee was made up of five members of the English Department, including Dr. Thurmond. The committee determined that Dr. Hetrick's contract should not be renewed and she was so informed the following day. Dr. Thurmond testified that neither Dr. Hetrick's class discussion of the Vietnam War nor her "unwed mother" remark were mentioned or discussed by the committee. Dr. Thurmond's recommendation that Dr. Hetrick not be rehired was based upon his belief that: 1) her class assignments in Freshman Composition were inconclusive; that 2) it appeared she was inclined to discuss extraneous matter in her classes; that 3) she lacked a sense of camaraderie and did not seem to adjust with the other members of the Department; and that 4) she had been unable to fulfill her Ph.D. requirements as promised. The other members of the committee concurred with Dr. Thurmond's recommendation and accordingly voted not to renew her contract.

9) The court finds that the reasons upon which Dr. Thurmond's recommendation for non-renewal was based are supported by fact. However, the court finds from the tenor of the evidence that the non-renewal of Dr. Hetrick's contract was not based so much on those specific reasons, as it was on the feeling of Dr. Thurmond and the other faculty members of the English Department that Dr. Hetrick's teaching philosophy and the manner in which she implemented it were not adaptable to the achievement of the academic goals of the University. This difference in pedagogical attitudes was noted by Dr. Hetrick in her testimony:

> "Well let me state that I felt that the way the objectives of the department were stated, suggested certain

assumptions about what students are that were different from the basic assumptions I have, which guide my teaching, and I think this is one of the reasons why some students see me as different from other of the more traditional teachers." (Tr. 461).

Based upon the foregoing findings of fact the court makes the following conclusions of law.

Conclusions of Law

1) The court has jurisdiction over this matter under 28 U.S.C. 1343 and 42 U.S.C. 1983.

2) A person does not have a constitutional right to public employment, but a governmental employee may not be dismissed from his job for constitutionally impermissible reasons. A state may not discourage the exercise of one of its employee's First Amendment rights by the threat of or actual termination of that person's employment. Hetrick v. Martin, 322 F. Supp. 545 (1971); and Orr v. Trinter, 444 F. 2d 128 (6 Cir. 1971).

3) A University is not compelled to grant a non-tenured professor an evidentiary hearing prior to the non-renewal of that professor's contract. Board of Regents v. Roth, —— U.S. —— (1972).

4) The plaintiff in this action would only be entitled to relief if the defendants' decision not to renew her contract was precipitated by the plaintiff's exercise of First Amendment rights.

5) Based upon the evidence offered at the hearing and that submitted in the record it is the conclusion of the court

that the decision of the University not to renew Dr. Hetrick's contract was not motivated by her participation in First Amendment activities. The court is satisfied that the defendants' decision not to renew Dr. Hetrick's contract was based solely upon their concern for her teaching methods and ability. Whether the University's decision was wise is of no importance here, inasmuch as the evidence demonstrates that the decision was not affected by Dr. Hetrick's engagement in First Amendment activities.

The First Amendment guarantee of academic freedom provides a teacher with the right to encourage a vigorous exchange of ideas within the confines of the subject matter being taught, but it does not require a University or school to tolerate any manner of teaching method the teacher may choose to employ. A University has a right to require some conformity with whatever teaching methods are acceptable to it. In this case it simply appears that Dr. Hetrick's teaching techniques were not acceptable to the University. The court is not in a position to weigh the merits of Dr. Hetrick's educational philosophy—it may be that her methods of teaching were and are more desirable than those embraced by the other members of the English Department —but the fact that the University decided that they were not and chose not to renew her contract, does not mean that her constitutional rights to academic freedom and freedom of speech were impinged.

An order will this day be entered granting judgment to the defendants and dismissing the action upon the merits.

MAC SWINFORD
Judge

OCT 6 1972

Memorandum Opinion

[Filed October 6, 1972]

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
LEXINGTON

No. 2175

PHYLLIS B. HETRICK,

Plaintiff,

v.

ROBERT B. MARTIN, President of Eastern Kentucky University, and THE BOARD OF REGENTS, Eastern Kentucky University,

Defendants.

The record of this case, instituted under the Civil Rights Act, 42 United States Code 1983, is submitted to the court for final judgment. The plaintiff, Dr. Phyllis B. Hetrick, contends that those rights, privileges and immunities secured to her by the Constitution have been denied her by officers of Eastern Kentucky University acting under color of State law.

In September of 1969, Dr. Hetrick was granted a one year contract to fill a vacancy in the faculty of the English Department at Eastern Kentucky University. In February of 1970, she was informed that her contract would not be renewed. It is argued that the decision not to renew the

contract was grounded upon the University's disapproval of the exercise of her First Amendment rights.

On February 23, 1971, the court overruled the defendants' motion to dismiss the complaint on the grounds that it failed to state a claim upon which relief could be granted. Although it is clear that the termination of a non-tenured teacher's contract may not be, in most instances, litigable under contract law, it is equally clear that such a teacher may not be dismissed or not rehired for constitutionally impermissible reasons. As the court stated in its memorandum of February 1971, "a State, by and through its officials, may not elect to discontinue a contract of employment solely because the employee has exercised his constitutional rights in a manner which is displeasing to certain of his superiors." Hetrick v. Martin, 322 F. Supp. 545 (1971); and see Orr v. Trinter, 444 F. 2d 128 (6 Cir. 1971).

The single issue to be resolved is whether the University's decision not to rehire Dr. Hetrick was based upon her engagement in conduct protected by the First Amendment.

It is Dr. Hetrick's position that the non-renewal of her contract resulted from certain statements she made in her classes relating to the Vietnam War and the military draft. Were this contention adequately corroborated it may be that relief would be proper, however, the evidence produced at the hearing leads only to the conclusion that the University's determination not to rehire Dr. Hetrick was based solely upon concern for her pedagogical attitudes. Although the court is inclined to believe that the classroom inadequacies that Dr. Hetrick was alleged to have displayed —inconclusive assignments, extraneous classroom discussions, and insufficient coverage of suggested materials— were largely superficial and thus easily correctable, it is

not the duty of the court to evaluate the wisdom of the University's decision not to renew the contract. It simply seems that Dr. Hetrick's teaching methods were too progressive, or perhaps less orthodox than the other faculty members in her department felt were conducive to the achievement of the academic goals they espoused. The court must conclude that a State University has the authority to refuse to renew a non-tenured professor's contract for the reason that the teaching methods of that professor do not conform with those of the tenured faculty or with those approved of by the University.

It would be hoped that some form of teacher evaluation more equitable than the "secret evaluation committee" called to determine Dr. Hetrick's fate with the University could be devised. It is astonishing to the court that none of the members on the "secret evaluating committee", save perhaps Dr. Thurmond, had any substantive knowledge or familiarity of Dr. Hetrick or her classroom work. A decision making process of that sort would dangerously propend toward arbitrary determinations with no basis in fact. Nevertheless as a matter of constitutional due process it seems that a University is only required to grant a hearing to a tenured professor. Board of Regents v. Roth, —— U.S. —— (1972); Shields v. Watrel, 333 F. Supp. 260 (1971).

In the case of a non-tenured teacher, a State University may be held to account only when it can be shown by a preponderance of the evidence that the teacher, in the discharge of her duties, made statements or engaged in activities that were the exercise of her personal rights protected by the provisions of the Constitution of the United States. The plaintiff has not sustained this burden of proof.

It is the judgment of the court that the decision of the authorities of Eastern Kentucky University that Dr. Hetrick's contract should not be renewed was not influenced by or predicated upon any statements or activities which she made or in which she engaged that were protected by the First Amendment.

An order dismissing this action at the cost of the plaintiff is this day entered.

MAC SWINFORD
Judge

OCT 6 1972

Opinion of District Court Denying Motion to Dismiss

[Filed February 23, 1971]

UNITED STATES DISTRICT COURT

E. D. KENTUCKY
LEXINGTON DIVISION

No. 2175

PHYLLIS B. HETRICK,

Plaintiff,

v.

ROBERT B. MARTIN, President of Eastern Kentucky University, and the BOARD OF REGENTS OF Eastern Kentucky University,

Defendants.

SWINFORD, District Judge.

This proceeding is before the court on a motion by the defendants to dismiss for failure to state a claim upon which relief may be granted.

Plaintiff, Mrs. Phyllis B. Hetrick, has instituted this action under section 1983 of Title 42, United States Code. On September 1, 1969, Mrs. Hetrick was given a one year contract to fill a permanent vacancy in the Faculty at Eastern Kentucky University. It was anticipated that the contract would be renewed until Mrs. Hetrick acquired tenure.

In October, 1969, during the "Vietnam Moratorium" she had occasion to discuss the Vietnam War and military draft in one of her classes. Subsequently, it is alleged, she was accused of having engaged in draft counseling and on February 27, 1970, she was informed that her contract would not be renewed. She requested that she be given a hearing and written reasons for the non-renewal of her contract, but, it is asserted, no hearing was granted and no reasons were given, except that she was "unsociable" and that her class assignments were "inconclusive".

It is the plaintiff's contention that the decision not to renew her contract was arbitrary and capricious without regard to her professional qualifications in violation of the First and Fourteenth Amendments to the Constitution of the United States. Mrs. Hetrick claims that Eastern Kentucky University, acting through and by its Board of Regents, and Robert Martin, President of Eastern Kentucky University, have acted in such a manner as to deny and deter the free exercise of her First Amendment rights.

Included in the defendants' motion to dismiss is the contention that the complaint fails to make sufficient jurisdictional allegations. It is the judgment of this court that its jurisdiction has been properly invoked and that the action is properly filed under section 1343(3) (4) of Title 28 and section 1983 of Title 42, United States Code. See Brown v. Strickler, 422 F.2d 1000 (6 Cir. 1970). It is clear from the complaint, although not expressly stated, that the plaintiff asserts that those rights, privileges and immunities secured to her by the Constitution have been deprived her by certain officials and agents of the State supposably acting under authority or color of State law.

The sole function of the court at this stage of the proceedings is to determine whether the complaint, assuming

its allegations to be true, states a cause of action. The strength or merit of the plaintiff's claim is not something the court may consider at this juncture, as the determination of whether the plaintiff can prevail may only be decided on the basis of proof, and not the pleadings.

The defendants' motion to dismiss is grounded upon the theory that the plaintiff, in accepting the one year contract, had only an expectancy to have her contract renewed. It is argued that an expectancy will not support a claim for relief; that Eastern Kentucky University, by and through its officers, had a right to refuse to renew the plaintiff's contract. Moreover, it is claimed the decision not to renew Mrs. Hetrick's contract did not, nor does not deprive her of her constitutional rights.

It is apparent from an examination of recent analogous federal cases that there is some difficulty in ascertaining under what set of circumstances a non-tenured State teacher or professor may initiate a constitutional attack against his dismissal. Jones v. Hopper, 410 F.2d 1323 (10 Cir. 1969); Johnson v. Branch, 364 F.2d 177 (4 Cir. 1966); McLaughlin v. Tilendis, 398 F.2d 287 (7 Cir. 1968); and Roth v. Board of Regents of State Colleges, 310 F.Supp. 972 (D.C.1970). It may be fairly stated that an employee of a State does not have a constitutional right to have his contract renewed, however, a State, by and through its officials, may not elect to discontinue a contract of employment solely because the employee has exercised his constitutional rights and privileges in a manner which is displeasing to certain of his superiors. This is somewhat of a paradoxical statement for it boils down to the proposition that a person does not have a constitutional right to public employment, but does have a constitutional right not to be dismissed (for certain reasons) from public employ-

ment. The United States Court of Appeals for the Fifth Circuit in the case of Pred v. Board of Public Instruction of Dade County, Fla., 415 F.2d 851 (1969) was confronted with the argument that a holder of an unrenewed contract for public employment may avenge his loss only through contractual remedies (which in the case of non-tenured teachers may not exist), as there is no constitutional right to public employment. The court concludes that the argument was specious as it was an effort to dilute a constitutional right to a contractual one:

> "Equally unpersuasive is the related argument that since there is no constitutional right to public employment, school officials only allowed these teachers' contracts to expire, and thus they cannot be liable for a violation of any rights protected by § 1983. But in the posture of this case this misconceives the whole thrust of their claim. The right sought to be vindicated is not a contractual one, nor could it be since no right to reemployment existed. What is at stake is the vindication of constitutional rights—the right not to be punished by the State or to suffer retaliation at its hand because a public employee persists in the exercise of First Amendment rights." 415 F.2d at 856.

In Ferguson v. Thomas, 430 F.2d 852 (1970), the Court of Appeals for the Fifth Circuit cited its opinion in Pred and stated:

> "While he (State college instructor) has no right to continued public employment, such a teacher may neither be dismissed or not be rehired for constitutionally impermissible reasons such as race, religion, or the assertion of rights guaranteed by law or the Constitution.

This rationale would even apply to a teacher without tenure or an expectancy of reemployment."

In the instant case the court does not take issue with the assertion that Mrs. Hetrick did not nor does not have a contractual right to be rehired. However, Mrs. Hetrick does have the right to exercise certain freedoms of speech which cannot be discouraged by the State. The defendants' motion to dismiss must be overruled. The principal questions raised by the pleadings are whether Mrs. Hetrick's activities came within the area of speech protected by the First Amendment and whether her dismissal was predicated on her engagement in those activities.

An order denying the defendants' motion to dismiss will this day be entered.